Nos. 590 and 591.

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Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER

of

ASSOCIATED GAS AND ELECTRIC COMPANY,

Debtor.

In Proceedings for the Reorganization of a Corporation Pursuant to Chapter X of the Bankruptcy Act.

No. 590

IRVING ELIAS, MAX MENACHEN and MICHAEL MOISE, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, etc., *et al.*,

Petitioners,

against

STANLEY CLARKE, TRUSTEE OF ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

No. 591

THATCHER C. JONES, FREDERICK T. SUTTON and RUSSELL M. VAN KIRK, constituting the Scrip Holders Protective Committee of ASSOCIATED GAS AND ELECTRIC COMPANY,

Petitioners,

against

STANLEY CLARKE, TRUSTEE OF ASSOCIATED GAS AND ELECTRIC COMPANY, Debtor, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

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Glossary of Abbreviations.

Ageco—Associated Gas and Electric Company, Debtor.

CCs—Convertible Certificates without fixed maturities.

CDCs—Convertible Debenture Certificates and Convertible Debenture Obligations without fixed maturities.

CICs—5½% Convertible Investment Certificates, due November 15, 1938.

COABs—Convertible Obligations, Series A and B, due 2002.

Elias Committee—Petitioners in No. 590, Irving Elias, Max Menachen and Michael Moise, constituting the Protective Committee for the Holders of Convertible Obligations, Due 2002, All Series (Exclusive of Those Holders Who Acquired Same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company.

Jones Committee—Petitioners in No. 591, Thatcher C. Jones, Frederick T. Sutton and Russell M. Van Kirk, constituting the Scrip Holders Protective Committee of Associated Gas and Electric Company.

Old COs—Convertible Obligations without fixed maturities.

Original Holders of COABs—Holders of COABs who obtained such securities in exchange for CDCs and still retain those securities.

Scrip—Interest Bearing and Non-Interest Bearing Scrip.

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Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (pp. 324-338)* is reported in 143 F. (2d) 640. The opinion of the United States District Court for the Southern District of New York (811-891) is reported in 53 F. Supp. 107.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on July 14, 1944 (p. 337). The petitions for writs of certiorari in No. 590 and No. 591 were filed on October 12, 1944. The jurisdiction of this Court is invoked by petitioners under Section 24(c) of the Bankruptcy Act [11 U. S. C. §47 (c)].

Statement of Case.

The facts are for the most part sufficiently set forth in the petitions for writs of certiorari. We have these additional comments:

The judgment sought to be reviewed affirmed an order of the District Court, under Section 197 of the Bankruptcy Act (11 U. S. C. §597), which classified holders of Convertible Obligations, Series A and B, due 2002 (COABs)†, and Interest Bearing and Non-Interest Bearing Scrip (Scrip) of Associated Gas and Electric Company (Ageco) as subordinate to all general creditors except holders of obligations

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* Because of a confusion in folio numbers in printing the decision of the Circuit Court of Appeals, references to that decision are to pages of the Record and are preceded by "p.". Other references are to folio numbers of the Record.

† A glossary of the abbreviations used in this brief appears at page iv of this brief.

convertible at Ageco's option into stock (897-898; 899-900; p. 337).

There are various references in the petitions and supporting briefs to a Plan of Compromise and a Plan of Reorganization proposed by the Trustee of Ageco and the Trustees of Associated Gas and Electric Corporation. Neither of those Plans forms any part of the record in this case; as the Circuit Court of Appeals observed, "only the *fact* of compromise, and not the details of its terms, is before us at this time" (p. 325). Obviously, the fairness of those Plans to petitioners' constituents cannot be in issue here when the Plans themselves are not involved in this proceeding. The judgment sought to be reviewed did not pass on those Plans; it was concerned solely with the proper classification of the COABs and Scrip "for the purposes of *any* plan of reorganization of the Debtor" (897).

Petitioners' arguments based upon the recognition in the Plan of Compromise and the Plan of Reorganization of the claims of holders of Convertible Investment Certificates, due 1938 (CICs), holders of Convertible Debenture Certificates (CDCs), and Original Holders of COABs, are thus wholly irrelevant to this case. The appropriate time at which to attack the fairness of provisions contained in a particular plan is in a proceeding which contemplates the approval or confirmation of that plan. And this is not such a proceeding. The Plan of Compromise and the Plan of Reorganization to which petitioners refer were both approved by the District Court after the decision below was handed down. See *In re Associated Gas and Electric Company, et al.*, C. C. H. Bankruptcy Law Service ¶ 54, 990 (S. D. N. Y., August 25, 1944, Leibell, D. J.) (not officially reported). Petitioners among others have appealed from

the District Court's orders of approval; those appeals are now pending in the Circuit Court of Appeals.

The order here sought to be reviewed did not adjudicate anything as to the CICs, CDCs or Original Holders of COABs. The order merely reserved the claims of those security holders for later determination (904).

It is not clear just whom petitioners represent and what are the facts as to the claimants they represent.

Petitioners are not themselves claimants; they are committees for classes of security holders. Petitioners in No. 590—the Elias Committee—style themselves a "Protective Committee for the Holders of Convertible Obligations, due 2002, All Series, (exclusive of those Holders who Acquired same by Direct Exchange for Original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F) of Associated Gas and Electric Company" (910-911).

Petitioners in No. 591—the Jones Committee—style themselves the "Scrip Holders Protective Committee of Associated Gas and Electric Company" (907).

Despite the order of the Court requiring claims to be filed, petitioners filed no claims (3-4). Two claims of individual claimants are included by petitioners in the Record on Appeal (8-29); but those claimants neither were appellants in the Circuit Court of Appeals nor are they petitioners in this Court; nor have petitioners stated that the claim they wish to prosecute is based upon the facts set forth in those proofs of claim.

The facts as to petitioners' position remove from this case certain issues. For example, petitioners in No. 590,

the Elias Committee, suggest in their petition for certiorari as one of the questions presented (Petition, p. 14):

> "9. Is the New York Law applicable to the rights of all assignees and transferees of COABs?"

Apparently this question is based on the suggestion that some assignees or transferees may have acquired their securities under circumstances such that the law of some other State may be applicable. Nowhere is there any suggestion that petitioners represent any such persons, or if they do, what the facts are and which law it is that petitioners claim is applicable.

Similarly, petitioners in No. 591, the Jones Committee, devote almost their entire brief to the argument that the provision of the CDCs for conversion of the CDCs into stock at the Company's option is unlawful and invalid. But nowhere in these proceedings has it appeared, and nowhere does it appear in this record, that petitioners number among their constituents a single person who exchanged CDCs upon Ageco's exercise of its option.

The securities represented by petitioners—Convertible Obligations, Series A and B (COABs), and Interest Bearing and Non-Interest Bearing Scrip (Scrip)—all contain a subordination clause. The subordination clause in the COABs (877-881; 511-516) provides, in part, as follows:

> "It is the intent hereof that this Obligation and all other Obligations of this issue shall be subordinate to the following (hereinafter called 'Senior Obligations'), namely: all bonds, debentures and other indebtedness of the Company and of any successor corporation, now or hereafter created and outstanding, except (1) the Obligations of this issue and (2) indebtedness or Obligations convertible at the option of the Company into stock of the Company

of any class or subordinated by their terms to other indebtedness or obligations of the Company."

The subordination clause in the Scrip is substantially the same (888; 554-557).

The order of the District Court (897-898; 900) affirmed by the Circuit Court of Appeals (p. 337) merely enforces that clause by classifying all petitioners' constituents as subordinate to the general creditors of Ageco, except holders of obligations convertible at Ageco's option into stock.

Questions Presented.

The questions presented by the petitions for certiorari come down to these:

(1) Are the subordination clauses contained in the COABs and Scrip valid and enforceable in bankruptcy?

(2) Even assuming that Original Holders of COABs have a right to rescind the transactions whereby they received COABs in exchange for CDCs, did that right of rescission pass to transferee and other holders of COABs?

(3) Was the provision in the CDCs for conversion into stock at the Company's option invalid under New York law?

(4) Was the procedure in the District Court and in the Circuit Court of Appeals erroneous in that (a) the District Court merely decided questions "(1)" and "(2)" above

and thus found it unnecessary to pass on "(3)", while (b) the Circuit Court of Appeals also decided "(3)" above?

Petitioners in No. 591, the Jones Committee representing Scrip holders, have not presented question "(2)" above in so far as it relates to Scrip holders.

No question is presented as to whether, assuming the CDC conversion option to be valid, the Debtor, Associated Gas and Electric Company (Ageco), properly exercised it.

Respondents' Contentions.

We propose to show that:

I. No ground for certiorari exists.

II. The subordination provisions in the COABs and Scrip are valid and effective.

III. Any cause of action for rescission of exchanges of CDCs for COABs did not pass to petitioners' constituents.

IV. The provision for conversion of the CDCs into stock at the Company's option is valid under New York law.

V. The procedures of the District Court and the Circuit Court of Appeals were proper.

POINT I.

No ground for certiorari exists.

None of the grounds for certiorari specified in Rule 38(5)(b) of this Court exists, and no other ground is suggested.

1. There is no suggestion of a conflict between the decision of the Circuit Court of Appeals in this case and decisions of other Circuit Courts of Appeals on the same matter. Nor is there any suggestion of a conflict with any applicable decision of this Court.

2. The only question of Federal law involved in the case is the enforceability in bankruptcy of a subordination provision. That is a question upon which all Federal courts that have passed on it are in agreement; such provisions have uniformly been held valid. All that is involved is the application of this well settled rule to the particular language of the instruments in this case.

There are references in the brief to the increasing frequency of reorganizations of large "quasi public" holding companies by the Securities and Exchange Commission. But no question peculiar to such reorganizations is involved in the case.

The constitutional questions suggested by petitioners are without substance; and they were not raised below.

3. Petitioners do not cite any applicable local decisions of the New York courts inconsistent with the results reached below.

Only two questions of local (New York) law are seriously argued by petitioners. Those two questions are:

> a. Does a transfer of a security carry with it the transferor's cause of action for rescission of the transaction whereby he acquired the security; and

b. Does New York law permit and enforce a provision in a debt security of a New York corporation whereby the security may be converted into stock at the corporation's option?

These questions are discussed in Points II and III of this brief.

The first of these questions has been directly ruled upon, adversely to petitioners' contentions, by the New York courts. The second, so far as we know, has not been ruled on, but requires only elementary construction of the New York statute.

As bearing on the propriety of certiorari in this case we emphasize the relationship of these questions to the final result. Unless petitioners are correct in their contention that the subordination clause is ineffective and unenforceable on its face, petitioners can prevail only if they are successful on both these issues of New York law. The first of the issues as to local law has been conclusively determined against petitioners by decisions of the New York courts; and petitioners in No. 591, the Jones Committee (Scrip), do not even present this issue in their petition for certiorari or in their brief.

4. The contention most vigorously urged by petitioners in support of their petitions for writs of certiorari is that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

There was no such departure.

In the District Court petitioners contended that the CDC exchanges were invalid and that petitioners' constituents were in effect the assignees of the cause of action for rescission of those exchanges. The District Court held that

they were not the assignees of that cause of action and therefore found it unnecessary to rule upon the validity of that cause of action.

The Circuit Court of Appeals agreed with the District Court. But it went further and passed upon the merits of the cause of action for rescission of the exchanges.

Petitioners say that the District Court should have passed on the merits of the rescission cause of action and that the Circuit Court of Appeals should not have. It seems clear to us that the District Court, in the exercise of judicial economy, was not required to pass upon issues unnecessary to its final decision. And petitioners cannot complain that the Circuit Court of Appeals passed on the merits because, as the Circuit Court of Appeals pointed out, "petitioners have presented the case on the merits" (p. 331), and the Circuit Court of Appeals was merely deciding the question presented by petitioners.

We discuss the procedural aspects of the case in Point V of this brief.

POINT II.

The subordination provisions in the COABs and Scrip are valid and effective.

The order sought to be reviewed enforces the subordination provisions of the COABs and the Scrip according to their terms.

(1) Subordination agreements enforceable in bankruptcy.

It is now settled law that subordination agreements are enforceable in bankruptcy.

Bird & Sons Sales Corp. v. *Tobin,* 78 F. (2d) 371 (C. C. A. 8th, 1935) cited with approval in *Sampsell* v. *Imperial Paper & C. Corp.,* 313 U. S. 215, 219 (1941);

In re Aktiebolaget Kreuger & Toll, 96 F. (2d) 768 (C. C. A. 2nd, 1938);

St. Louis Union Trust Co. v. *Champion Shoe Machinery Co.,* 109 F. (2d) 313 (C. C. A. 8th, 1940);

Bank of America v. *Erickson,* 117 F. (2d) 796 (C. C. A. 9th, 1941);

In re George P. Schinzel & Son, Inc., 16 F. (2d) 289 (S. D. N. Y., 1926);

In re Handy-Andy Community Stores, Inc., 2 F. Supp. 97 (W. D. La., 1932).

The *Kreuger & Toll* case was an appeal from a classification order in a bankruptcy proceeding which subordinated holders of the bankrupt's "participating debentures" to its general creditors, as to both principal and interest. The

order appealed from was predicated on a subordination clause in the participating debentures. In overruling the appellant's contention that Sections 64(b) and 65(a) of the Bankruptcy Act prohibited enforcement of subordination contracts unless the creditor claiming the benefit of the contract was "a party to the contract or was the sole beneficiary", or unless there were an estoppel, the Circuit Court of Appeals said (at 770):

> "Section 64b of the Bankruptcy Act, as amended, 11 U. S. C. A. §104(b), for reasons of public policy, creates priorities regardless of the parties' contracts and overrides inconsistent covenants. But this does not mean that the parties are prohibited from making contracts for a priority or subordination in so far as they do not impinge upon statutory priorities. Section 65a of the act, 11 U. S. C. A. §105(a), means no more than that dividends paid to creditors shall be pro rata except where there is a priority given by law or by lawful contractual arrangement between the parties. *Bird & Sons Sales Corporation* v. *Tobin,* 8 Cir., 78 F. 2d 371."

(2) "Inconsistency" of the subordination provisions—relation to CDCs and to 5½% CICs, due 1938.

Petitioners make a great point of the fact that the subordination clauses do not subordinate their securities to indebtedness of Ageco but merely to all indebtedness "except * * * indebtedness or Obligations convertible at the option of the company into stock of the Company" (512; 555; 877). Petitioners say that there are securities—the CDCs and the 5½% Convertible Investment Certificates, due 1938 (CICs)—which are convertible at the Company's option into stock; that therefore the COABs and Scrip are not subordinate to, but are on a parity with, the CDCs and the CICs; that the CDCs and CICs do not

contain any subordination clause and that they are therefore on a parity with the other general creditors; that, since the COABs and Scrip are on a parity with the CDCs and the CICs, they must also be on a parity with the other general creditors, and that the subordination provisions consequently defeat themselves.

The argument poses a diverting paradox, but one which is resolved by the common sense rules of contract and marshalling. Contracts calling for subordination can be enforced even though the contract is for subordination to some, but not all, of the general creditors. All that need be done is to give, to the creditors in whose favor subordination exists, the share that would otherwise have gone to the subordinated creditors. Thus in the case at bar:

1. Determine the dividends or participations that would be distributable to general creditors, CICs, CDCs, COABs, Scrip, if all were on an equal footing.

2. Take the dividends or participations computed in this manner, and distributable to the COABs and Scrip, and add them to the dividends or participations going to only those general creditors to whom the COABs and Scrip have agreed to subordinate their claims.

The first step gives effect to the provision (if any) of the contract that the COABs and Scrip are not subordinate to the CDCs and CICs. The second step gives effect to the provision of the contract that they are subordinate to other general creditors. Thus, all provisions of the contract are enforced without any inconsistency.

This is exactly what was done in *Bird & Son Sales Corporation* v. *Tobin*, 78 F. (2d) 371 (C. C. A. 8th, 1935).

Accord:

In re George P. Schinzel & Son, Inc., supra;
In re Handy-Andy Community Stores, Inc., supra.

The only possible consequence of petitioners' argument is not to improve their position, but rather to affect adversely the relative participations of holders of CDCs and CICs as against other general creditors. That may affect the propriety of the orders confirming the Plan of Reorganization and Plan of Compromise, as against the objection of other general creditors; it does not affect the order of classification here sought to be reviewed.

POINT III.

Any cause of action for rescission of exchanges of CDCs for COABs did not pass to petitioners' constituents.

Petitioners say their constituents' rights are not circumscribed by the terms of their securities, including particularly the subordination clause, for the following reasons:

They assert that the provision in the CDCs for conversion into stock at the Company's option was invalid. (In the Courts below, but not in this Court, they argued that the transactions whereby certain COABs were issued in exchange for CDCs were induced by fraudulent misrepresentations as to the validity of the option, the propriety of its exercise by Ageco, and the compliance by Ageco with the conditions of the option.) Therefore, say petitioners, their constituents have the right to rescind those exchanges and become holders of CDCs, securities which have no subordination clause.

The Special Master (784; 645-665) and the Circuit Court of Appeals (pp. 332-336) both held that the exchanges were valid. Even if we assume for purposes of discussion—as did the District Court (843)—that the CDC exchanges were invalid for one reason or another, and that the transactions can be rescinded by Original Holders of COABs, still the security holders represented by petitioners have no standing to rescind the exchanges, and they derive no rights by virtue of the assumed invalidity of those exchanges.

(1) Petitioners in No. 590, the Elias Committee (COABs).

The Elias Committee represents no Original Holders of COABs—persons who received and still hold COABs

issued to them in exchange for CDCs. The representation of the Elias Committee is limited to holders of COABs "exclusive of those Holders who Acquired same by Direct Exchange for original Convertible Debenture Certificates or Convertible Debenture Obligations, Series F" (910). Their appeal to the Circuit Court of Appeals was similarly limited (911).

It seems obvious that petitioners' constituents—who did not acquire their COABs through exchanges for CDCs—cannot complain of the invalidity of CDC exchanges made by someone else. This conclusion is reinforced when we consider how the present holders (other than Original Holders) did acquire their COABs. They acquired them either (a) directly from Ageco or (b) from some previous holder.

(a) *Acquisitions directly from Ageco.*

As the District Court found (883):

> "Many of the COABs now outstanding were not issued in exchange for CDCs, CCs or Old COs. Many COABs were issued in the first instance for cash or on exchange for securities of other companies."

If the COABs were issued for cash or for securities of other companies, the holders cannot complain of the invalidity of the CDC exchanges; that just had nothing to do with them.

If the COABs were acquired directly from Ageco on an exchange for Convertible Certificates (CCs) or Convertible Obligations without fixed maturities (Old COs), petitioners are not helped, for the CCs and Old COs contained subordination provisions substantially identical to those contained in the COABs (874). And so rescission would be of no avail in that case.

(b) *Acquisitions from previous holders.*

If the COABs transferred from previous holders were originally issued by Ageco to the transferors of the present holders otherwise than in exchange for CDCs, then obviously neither the transferors nor the present holders could complain of the invalidity of the CDC exchanges.

Petitioners recognize the foregoing facts, so that the argument of the Elias Committee on the rescission issue is directed, as we see it, exclusively to transferee holders of COABs whose transferors originally acquired the COABs on an exchange for CDCs. There are undoubtedly a large number of such transferee holders, though the record does not show that petitioners represent any of them.

Petitioners do not claim that any of their constituents obtained a specific assignment of any right of rescission that any transferors may have had, or that they knew or even were interested in the circumstances under which their transferors had acquired their COABs. Presumably the only written assignment executed was that contained on the back of the certificate, which read (884-885):

> "For Value Received the undersigned does hereby sell, assign and transfer unto..... the within Convertible Obligation of Associated Gas and Electric Company, and does hereby constitute and appoint ..... attorney to transfer said Obligation on the books of Associated Gas and Electric Company, with full power of substitution in the premises."

That assignment purported to be and was simply an assignment of the security, not of any cause of action that the transferor may have had for damages or rescission arising from fraud or misrepresentation in connection with the exchange of CDCs for COABs.

Under these circumstances, why should the transferees have any right of rescission? They were in no way misled or defrauded. They got just exactly what they bargained for and expected. They went into the market to get COABs —perfectly valid securities containing a subordination clause. They obtained those securities, not knowing or caring where or how their transferors had acquired them. Their rights are not enlarged because particular transferors may have had a cause of action for rescission or damages based upon the fraudulent character of the CDC exchanges. Indeed, the customary way of fixing damages for fraud in the sale of a security is for the defrauded party to sell his security. Surely no one supposes that his purchaser acquires any right based on the fact that the seller was originally induced to buy the security by fraudulent misrepresentations. *Cf. Kenedy* v. *Benson,* 54 Fed. 836, 838 (C. C. Iowa, 1893). The purchaser gets merely the security and the contractual rights set forth therein.

This rather obvious rule is well supported by the authorities. In the absence of a specific assignment of the cause of action, or special circumstances indicating an intent to assign the cause of action, the mere assignment of a security or contract does not carry with it a transfer of collateral causes of action, such as a rescission claim, which the assignor may have had and which does not have its origin in any provision of the transferred security or contract.

In *Abel* v. *Paterno,* 245 App. Div. 285 (1st Dept., 1935),* stock in a cooperative apartment corporation had been sold by fraudulent misrepresentations. The court held that original purchasers of the stock were entitled to damages

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* As the Courts below held (846-847, p. 330), the decisions of the New York courts are controlling in this case. *Manufacturers Trust Co.* v. *Kelby,* 125 F. (2d) 650 (C. C. A. 2nd, 1942), cert. den. 316 U. S. 697 (1942).

for deceit, but that persons who acquired the stock from original purchasers had no cause of action based on the misrepresentations; that cause of action was retained by their assignors. In *Fox* v. *Hirschfeld,* 157 App. Div. 364 (1913), a cause of action for damages for fraudulent misrepresentations which induced plaintiff to enter into a contract to purchase real estate was held not to be assigned by an assignment of the contract.

Accord:

People v. *S. W. Straus & Co.,* 158 Misc. 186, 208 (Ref. Rep., N. Y. Sup. Ct., 1935) confirmed in this respect 158 Misc. 222 (N. Y. Sup. Ct., 1936);

Kenedy v. *Benson,* 54 Fed. 836 (C. C. Iowa, 1893);

Steele v. *Brazier,* 139 Mo. App. 319 (1909).

Similarly, the assignee of a contract does not acquire a cause of action which his assignor had for a breach of contract occurring before the assignment.

Hanna v. *Florence Iron Co.,* 222 N. Y. 290 (1918);

Hendry v. *Title Guarantee and Trust Co.,* 255 App. Div. 497 (1st Dept., 1938), affd. 280 N. Y. 740 (1939);

Schaffer v. *Vandewater & Co., Ltd.,* 160 App. Div. 803 (1914);

Smith v. *Continental Bank & T. Co.,* 292 N. Y. 275 (1944).

(2) Petitioners in No. 591, the Jones Committee (Scrip).

These petitioners contend that the CDC exchanges were invalid. But neither in their petition for certiorari nor in their supporting brief do they present or argue the

question of how they—holders of Scrip issued as interest on COABs—can take advantage of that invalidity.

The Scrip was issued by Ageco in 1936 and 1937 as interest on all outstanding COABs (887), in accordance with the authority contained in the COABs (384; 504).

This Scrip was issued to all holders of COABs whether or not they formerly held CDCs; none of it was issued to people who still held unsurrendered CDCs (887).

Persons to whom Scrip was issued have (a) nothing to rescind and (b) no relation whatever to the CDC exchanges.

(a) Suppose the Scrip holders did have a right to rescind, what would that rescission consist of? They received the Scrip from the Company in satisfaction of the obligation for interest on the COABs. If they rescinded, presumably they would return the Scrip to the Company and would have merely the Company's obligation for interest on the COABs—an obligation that would still be subordinate to general creditors in accordance with the subordination clause in the COABs (878).

(b) Holders of Scrip cannot rescind the CDC exchanges. They did not receive the Scrip as part of the CDC exchange transactions, but as part of entirely different transactions several years later. The very terms of the certificates characterize the Scrip as interest on the COABs, not on the CDCs (534-535, 541, 542, 551, 553).

Indeed, the very basis of the Scrip holders' rights is inconsistent with any rescission claim. For the Scrip represents interest on the COABs. Unless the COABs are validly outstanding, there is no right to interest. If the transaction whereby the COABs was acquired is rescinded,

there may be a right to interest that would have been paid on the CDCs; but that right is in no sense represented by Scrip issued as interest on COABs.

Many Scrip certificates were sold or transferred by their original holders (890). The assignment form in the case of Scrip is substantially the same as that in the case of COABs (890-891). What we have said about transferee holders of COABs is *a fortiori* applicable to transferee holders of Scrip.

POINT IV.

The provision for conversion of the CDCs into stock at the Company's option is valid under New York law.

The Jones Committee for Scrip holders (petitioners in No. 591) contends that the New York statute prohibits a provision such as that in the CDCs giving Ageco the option to convert the CDCs into stock on certain conditions.

The point is one of construction of the New York statute. It has been ruled on adversely to petitioners by the former Chief Judge of the New York Court of Appeals sitting as Special Master (645-651) and by the Circuit Court of Appeals sitting in New York (pp. 332-334). (The District Court did not pass on the issue.)

The statute involved is New York Stock Corporation Law, Section 16. At the time here involved, the relevant provisions of that statute were:

> "Every stock corporation other than a moneyed corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for such purposes. The consent to the execution of such mortgage, except a purchase-money mortgage, by the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon * * * shall be required. * * * When authorized by like consent, the directors, under such regulations as they may adopt,

> may confer on the holder of any debt or obligation, secured or unsecured, the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the directors conferring the right of conversion, into stock of the corporation."

The statute thus requires the consent of two-thirds of the stockholders for the issuance of an obligation convertible into stock at the holder's option. Petitioners contend that from this it follows that a corporation may not issue obligations convertible into stock at the corporation's option at all, whether or not two-thirds of the stockholders consent. They cite no case so holding or intimating.

We suggest that a more reasonable interpretation of the statute is that it merely imposes the requirement of two-thirds consent of stockholders on the right of corporations to issue obligations convertible into stock at the holder's option; and that the right to issue securities convertible at the corporation's option, not being mentioned in the statute, is not affected by it.

As the Circuit Court of Appeals pointed out, the provision of the statute upon which petitioners rely is not a grant of power but rather "a limitation on formal or more general previously existing powers" (p. 333).

That this is true as matter of history was pointed out in *Market & Fulton National Bank* v. *Jones,* 7 Misc. 207, 209 (N. Y. Sup. Ct. [1894] affd. 90 Hun 605 [1895]). The court there, considering the mortgage provision of this statute, said (7 Misc. at 209):

> "At common law any corporation, unless restrained by some provision of its charter, was permitted to mortgage its property in payment of its debts, or to secure money borrowed for business purposes (*De Ruyter* v. *St. Peter's Church,* 3 N. Y. 238;

Curtis v. *Leavitt*, 15 id. 9), but this right was curtailed by the general act * * *."

Accord:

R. F. C. v. *Eastern T. C. R. Corp.*, 266 App. Div. 148 (1943).

It is also true as matter of existing law. In the language of the New York Court of Appeals (*Jacobs* v. *Moncton R. I. Corp.*, 212 N. Y. 48, 56 [1914]):

> "I know of no principle of law which, as to commercial transactions within their [corporations] chartered powers and involving the receipt or borrowing of, and the obligation to repay, moneys, denies the entire freedom to regulate them by such a contract as the parties are willing to enter into."

Accord:

Hess v. *Sloane*, 66 App. Div. 522, 525 (1901), affd. on opinion below 173 N. Y. 616 (1903).

The first sentence of the statute grants to stock corporations the general "power to borrow money and contract debts" and to "issue and dispose of its obligations for any amount so borrowed." That power is complete except in so far as expressly limited. There is an express limitation of two-thirds consent for the issuance of obligations convertible into stock at the holder's option. There is no limitation and certainly no prohibition upon the issuance of such obligations convertible at the corporation's option.

There being no prohibition on the issuance of obligations convertible into stock at the Company's option, the provisions to that effect contained in the CDCs are valid and enforceable.

POINT V.

The procedures of the District Court and the Circuit Court of Appeals were proper.

(1) The District Court.

Petitioners complain that the District Court should not have decided their case without adjudicating the rights of the holders of unsurrendered CDCs and Original Holders of COABs.

Petitioners were not prejudiced by the procedure adopted by the District Court, for that procedure assumed all issues as to the right of Original Holders of COABs to rescind the CDC exchanges to have been decided in petitioners' favor. If, on that assumption, the case must still be decided adversely to petitioners, then petitioners were benefited, not hurt, by this procedure; it resulted in a speedy decision of their case and an early opportunity to have that decision reviewed.

We think it obvious that the control of the District Court over the administration of its business is sufficiently flexible to permit this speedy and just result. That power is reaffirmed by Rules 42(b) and 54(b) of the Federal Rules of Civil Procedure, which are applicable in this proceeding (General Order in Bankruptcy 37).

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> "JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which

> is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Commenting on this rule, this Court said in *Reeves* v. *Beardall,* 316 U. S. 283, 285 (1942):

> "That rule, the joinder provisions (see Rules 13, 14, 18, 20), and the provision of Rule 42 which permits the court to order a separate trial of any separate claim or issue, indicate a 'definite policy' (*Collins* v. *Metro-Goldwyn Pictures Corp., supra,* 106 F. 2d page 85) to permit the entry of separate judgments where the claims are 'entirely distinct'. 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. *Bowles* v. *Commercial Casualty Ins. Co.,* 4 Cir., 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of', though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329."

Accord:

> *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 F. (2d) 83, 84, 87 (C. C. A. 2nd, 1939);
>
> *Crutcher* v. *Joyce,* 134 F. (2d) 809 (C. C. A. 10th, 1943);
>
> 3 *Moore's Federal Practice* (1938) 3157.

What happened in the case at bar is this: Holders of CDCs, COABs, Scrip, and other securities not involved on these appeals, filed separate proofs of claim. Those claims were tried together because they seemed to involve many common questions of law and fact. In addition to the invalidity of the CDC exchanges alleged to be common to many of the claims, there were separate issues relative to petitioners' constituents' claims that did not exist in connection with the other claims. Those issues were whether the subordination provisions were valid and whether the alleged invalidity of the CDC exchanges vested any rights in petitioners' constituents. The decision of those issues determined the rights of petitioners' constituents.

The claims of petitioners' constituents having been decided, the District Court had power to enter an order classifying those claims immediately (Section 197 of the Bankruptcy Act, 11 U. S. C. § 597). It was not required to postpone entry until the determination of other claims —which were tried together with the claims of petitioners' constituents for convenience only. The District Court determined the claims represented by petitioners and certain other claims (839; 897-903) and reserved jurisdiction as to the balance (839-840; 904).

(2) The Circuit Court of Appeals.

The "assumption" in the District Court as to the validity of the cause of action for rescission of the CDC exchanges was, of course, an assumption for the purpose of considering whether petitioners' constituents were assignees of that cause of action. On that "assumption", the District Court held they were not assignees of that cause of action.

The Circuit Court of Appeals agreed with the District Court, on the same "assumption" (pp. 330-331). But because petitioners "have presented the case on the merits" (p. 331), the Circuit Court of Appeals also considered whether the "assumption" really fit the facts and decided that it did not and that the exchanges were valid.

Petitioners complain that the District Court should have considered these "merits". They also complain that the Circuit Court of Appeals should not have considered the merits. The Circuit Court of Appeals was entirely justified in doing so, and petitioners cannot complain of it.

Petitioners in No. 590 (COABs), in their statement pursuant to Rule 75(d) of the Federal Rules of Civil Procedure "of the points on which said appellants intend to rely" (933) in the Circuit Court of Appeals, included the precise issue upon which the Circuit Court of Appeals ruled (938):

> "11. The Special Master erred in failing to find that COAB Certificates which were received in exchange for CDC's should be restored to their original position as CDC Certificates and as such, entitled to participate in the reorganization or liquidation of AGECO Estate and its funds on a parity with the general unsubordinated creditors of AGECO."

Petitioners in No. 591 (Scrip) in their statement "of the points on which said appellants intend to rely" (918) in the Circuit Court of Appeals included the same issue with respect to their constituents (923-924, Point 11).

And the point was thoroughly briefed by petitioners in the Circuit Court of Appeals.

It was the fact of the presentation and argument of these issues to the Circuit Court of Appeals by petitioners that induced that Court to pass upon the issues. Thus,

after discussing the case on the "assumption" below, and agreeing with the District Court, the Circuit Court of Appeals said (p. 331):

> "Nevertheless we think it unfair to the appellants, who have presented the case on the merits, to rest a decision on an assumption which seems so thoroughly opposed to the realities."

Petitioners complain that the record is not as complete as they would have wished for the determination of this issue. But as the Circuit Court of Appeals pointed out (p. 334):

> "Appellants have brought up all the record they wished and have presented the case quite thoroughly on the merits. We do not think the proceedings should be further delayed against the remote chance —not suggested by appellants—that they may be able to point to some active fraud in fact upon the part of the Company which would overturn the master's finding."

Despite their complaint that the record is not complete, petitioners have not suggested either in the Circuit Court of Appeals or in this Court what, if anything, has been omitted that is at all material to the decision made by the Circuit Court of Appeals.

Indeed, in this Court the only issue argued on the "merits" is a sheer issue of law whether a provision for conversion of debt securities into stock at the Company's option is valid. No elaboration of the record could affect the answer to that question of law.

Having designated the merits as among the points on which they intend to rely in the Circuit Court of Appeals,

and having briefed the merits at length in that Court, petitioners are in no position to complain that the Court considered their arguments and rejected them. That is not a departure from the usual course of judicial procedure.

Conclusion.

The decision of the Court below is correct, and no sufficient reason has been advanced for its review by this Court. The petitions for writs of certiorari should therefore be denied.

Dated, New York, N. Y., November 3, 1944.

Respectfully submitted,

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